Petition

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81-937

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DEER PARK MEDICAL GROUP, P.A.
MONEY PURCHASE PENSION PLAN, *Petitioner*,

v.

CHERYL WINCHELL, M.D., *Respondent*.

On Writ Of Certiorari Re:
United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner, DEER PARK MEDICAL GROUP, P.A., MONEY PURCHASE PENSION PLAN, petitions this Honorable Court for a writ of Certiorari:

QUESTIONS PRESENTED

1. Whether Winchell was required to exhaust her administrative remedies prior to submitting this matter for consideration by the judicial system.

2. Whether a mistake was committed by the trial court in making a finding based on evidence which is in clear conflict with contemporaneous documents.

3. Whether the Court's position, as announced in *United States Gypsum Co.*, 333 U.S. 364, 685 S. Ct. 525 (1948), that a finding is clearly erroneous when testimony which supports such finding is in conflict with contemporaneous documents, continues to be applicable law.

4. Whether Dr. Winchell was an employee of Deer Park Medical Group, P.A. ("the Corporation") up to and including July 31, 1978.

PARTIES TO PROCEEDING IN COURT WHOSE JUDGMENT REVIEW IS SOUGHT

The caption of this case contains the names of all parties to the proceeding in the United States Court of Appeals for the Fourth Circuit whose judgment is sought, by this petition, to be reviewed.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

Deer Park Medical Group, P.A., Money Purchase Plan v. *Cheryl Winchell, M.D.*, unpublished decision, U.S. Court of Appeals for the Fourth Circuit, decided August 17, 1981, Docket No. 80-1803 and oral opinion of U.S. District Court for the District of Maryland.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The grounds on which this Court has jurisdiction are set forth in 28 U.S.C. 1254(1). Petitioners seek such review with respect to the unpublished decision of the U.S. Court of Appeals for the Fourth Circuit, dated August 17, 1981.

STATUTES INVOLVED

This case involves the provisions of 26 U.S.C. 7476, 29 U.S.C. 1053 (dealing with jurisdiction of the U.S. Tax Court and the minimum vesting provisions of the Employees Retirement Income Security Act ["ERISA"]) and 29 U.S.C. 1132 (providing for civil enforcement under ERISA). The provisions of such section are set forth in Appendix A hereto.

STATEMENT OF FACTS OF CASE

Petitioner is a Plan ("the Plan") adopted by Deer Park Medical Group, P.A., ("Deer Park") a professional corporation. The Plan was adopted in 1970, amended in 1976 to conform to ERISA requirements and amended again in 1979 to effect retroactive amendments determined by the Internal Revenue Service ("IRS") as necessary under ERISA. Favorable determination letters were obtained from the IRS upon the formation of the Plan and upon all amendments. Notice as required by sub-part (xvi) of Section o (3) of 26 C.F.R. 601.201 was given to all parties, including Respondent, upon each amendment of the Plan and such notice with respect to the 1979 amendments was given on January 24, 1979. On March 28, 1979, Respondent, through counsel wrote to the District Director of the Internal Revenue Service ("DDIR") and the Department of Labor, but took no other action with respect to the notice received on January 24, 1979.

Respondent became an employee of Deer Park in January of 1973 and in July of 1975 became a stockholder and director of Deer Park and a trustee of Petitioner. In her employment by Deer Park, Respondent was obligated to serve one (1) evening each week, and weekends on rotation with all other stockholder employees. Such obligations were evidenced by an agreement dated January 31, 1975, between Respondent and Deer Park which was admitted into evidence by the Trial Court. The agreement provided that it could be changed only by a signed

writing executed by the parties and that Respondent agreed to devote her best efforts and full business time to rendering professional services, and particularly the practice of medicine, on behalf of Deer Park.

The agreement also provided that the term of agreement ran from January 31, 1975 through July 31, 1975 and would be automatically extended for successive one (1) year periods, unless either party gave written notice ninety (90) days prior to the July 31, 1975 termination date. Similarly, the agreement required written notice of termination ninety (90) days prior to any succeeding termination date of July 31, or it was automatically extended for an additional year.

The agreement further provided that Respondent had no authority to contract for or obligate Deer Park in any way unless Deer Park's Board of Directors or executive officers specifically conferred such authority upon her. Under the agreement any notice to be given pursuant to the agreement was to be in writing, sent by registered mail to the parties at the addresses set forth on the execution page.

In March of 1978 Respondent made it known that she intended to leave the employment of Deer Park and at the May 5, 1978, her intentions as to date of her departure was requested. The minutes of such meeting, which were introduced as evidence at the Trial Court reflect that Dr. Winchell stated that she would let the Board of Directors know that she was leaving when she solidified her plans, and she specifically noted that ninety (90) days notice was all that was required of her. She further specifically stated at such meeting that she was only required to give ninety (90) days notice and when she was ninety (90) days away from leaving she would let the corporation know. Respondent testified that the minutes reflect essentially what occurred at the meeting.

The minutes of the June 20, 1978, Board of Directors meeting were also introduced into evidence at such meeting. There,

the Board of Directors proposed to amend the employment agreement of January 31, 1975 to provide that the required notice of termination of the employment agreement could be given ninety (90) days prior to August 4, 1978 if Respondent concurred. Respondent did not concur.

Under the Plan, employment with Deer Park on July 31, 1978 was required in order to obtain full contribution and full vesting for the period ending July 31, 1978, the end of Petitioner's year. Dr. James L. Hooper, administrator of the Plan testified that the purpose for such provision was to insure that a doctor employee would not leave employment with Deer Park prior to giving the required ninety (90) days notice prior to July 31, so that Deer Park could obtain a replacement from students who were completing their residency and who were available for hire approximately ninety (90) days prior to July 31. Mr. Zweibel, Respondent's attorney, testified that he had been told that in order for Respondent to receive allocation of contribution and full vesting for the Plan year 1978, she must stay employed until the end of the fiscal year July 31, and he so informed Respondent.

On June 21, 1978, Respondent was sent a petit jury summons, notifying her that she had been assigned to jury duty for two (2) weeks commencing on July 24, 1978. Subsequently, by her letter dated June 29, 1978, she submitted her resignation as an officer, member of the Board of Directors and employee of Deer Park, effective as of July 31, 1978. Immediately thereafter on Wednesday July 5, 1978 when her regular turn for evening duties arose, Respondent failed to appear for her duties of employment. On July 6, 1978 Dr. James L. Hooper, the President of Deer Park, noted to Respondent that she was scheduled for weekend duty the last weekend in July, July 29-30, 1978 and suggested that she work her regular weekend and come in on July 31, 1978, even if it were only the evening hours so that she would meet the requirements under the Plan for vesting and contribution. Dr. Robert Millman was also present at this time.

Respondent stated that after July 14, 1978 the offices of Deer Park would not set eyes on her again as a physician.

Dr. Hooper testified that he regarded Respondent's statement on July 6, 1978 as a severance of her employment and that he therefor caused Deer Park to pay termination pay to her through July 26, 1978. The payroll record of Deer Park reflects that Deer Park paid Respondent only through July 26, 1978.

Respondent testified that she was on vacation from July 17 through July 23, 1978 and began jury duty on July 24, 1978, but did not serve as a juror on any cases. She further testified that with respect to one (1) day during the week of July 24, 1981, she was told the prior evening that she need not report for jury duty the next day. She did not come to Deer Park for work however. Respondent further testified that she did not fulfill her employment on the weekend of July 29-30, 1978 (her regularly scheduled weekend to work). Lastly, she testified that on July 31, 1978, she told the jury commissioner that she was under a great deal of hardship coming to court every day and he excused her from further jury duty after the morning session. She did not report to Deer Park for employment, however.

Respondent testified that on June 29, 1978, Dr. Hooper offered to pay her for the month of July, 1978 if she did not come in. The appointment calendar kept by the corporation showed that Respondent did come in for work during the first two (2) weeks of July, 1978. No testimony or other evidence was presented with respect to the authority of Dr. Hooper to bind the corporation to pay Respondent for the month of July if she did not come in.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The complaint filed by Respondent alleges jurisdiction under Section 502(e) (1) of ERISA, 29 U.S.C. Section 1132(e) (1). It is the position of Petitioner, however, that the court of first

instance did not have jurisdiction of this matter, but that if any Court had jurisdiction, the Tax Court had jurisdiction. Neither the Trial Court nor the Appellate Court commented upon jurisdiction of the court of first instance, although Petitioner raised the issue of jurisdiction before both bodies.

ARGUMENT

Petitioner believes that the petition for writ of certiorari should be granted. This case represents the first time that the question of exhausting administrative remedies under the provision of ERISA has been presented to this court and it is Petitioner's belief that the law is clear that a challenge to the validity of provisions and/or determinations of a Plan covered by ERISA must be taken through the administrative remedies provided by law before a court may exercise jurisdiction over the controversy.

The provisions of 26 U.S.C. 7476 provide for jurisdiction in the U.S. Tax Court to make a declaratory judgment or decree with respect to initial qualification or continuing qualificastion of a pension plan. Section 7476 (b)(2) of 26 U.S.C. provides that the filing of a pleading in the U.S. Tax Court is premature unless a petitioner establishes to the satisfaction of the court that he has complied with the requirements prescribed by regulations of the Secretary with respect to notice to interested parties of the filing of a request for a determination by the Secretary. Section 7476 (b)(3) of 26 U.S.C. provides that a petitioner to the U.S. Tax Court must exhaust his administrative remedies available to him before the U.S. Tax Court will issue a declaratory judgment or decree.

Income Tax Regulation 1.7476-1 provides that before IRS can issue an advance determination as to the qualified status of a plan, the applicant must provide IRS with satisfactory evidence that the applicant has notified all interested parties of the application for determination. Income Tax Regulation 1.7476-1

also specifically refers to 26 C.F.R. 601.201(o) for rules of giving notice to interested parties.

The subparts of 26 C.F.R. 601.201(o) which are pertinent to the issue raised herein are subparts (3) xiv, (3) xv and (3) xvi. Subpart (3) xiv requires notice to be given to all interested parties of an application for advance qualification of a plan. Subpart (3) xv provides for giving notice to interested parties by mail not less than (10) days nor more than 24 days prior to the date an application for determination is made. Subpart (3) xvi provides that the notice shall be in writing and contain certain information, including the following:

1. a statement that any addressee is entitled to submit or request the Department of Labor to submit to the DDIR on the question of whether the plan meets qualification requirements;

2. a comment to the DDIR or a request of the Department of Labor must be made within the following times:

a. a comment to the DDIR must be received on or before the 45th day after the day on which the application for determination is received by such DDIR;

b. if the comment is being submitted on a matter on which the Department of Labor was first requested but declined to comment, on or before the later of such 45th day or the 15th day after the day on which the Department of Labor notifies such person it declines to comment, but in no event later than the 60th day after the day the application is received by the DDIR; and,

c. a request of the Department of Labor to submit such a comment must be such department on or before the 25th day (or if the person requesting the Department of Labor to submit such a comment wish to preserve their right to submt a comment to the DDIR in the event the Department of Labor declines to comment, on or before the 15th day after the day the application is received by the DDIR.

Under Income Tax Regulation 1.7476-2(a)(2) a former employee is considered an interested party to whom such notice must be sent.

Notice as provided above, was sent to Respondent's counsel that amendments to the plan were being filed on January 29, 1979. At no time did Respondent timely make comments as provided for in the above noted provisions. Instead, by letter dated March 15, 1979, *(the date upon which the 45 days referred to in the notice expired)*, she requested information of the Plan. In addition, on March 28, 1979 (almost two weeks after the last applicable date in the notice for filing comments expired), Respondent's counsel wrote to the DDIR and the Department of Labor on Respondent's behalf. In addition to the foregoing, Respondent was a trustee of the plan.

It is clear that Respondent failed to submit timely comments as provided for in 26 C.F.R. 601.201(o)(3), with respect to the 1979 amendments to the Plan, and thus she failed to exhaust her administrative remedies so as to attain standing before the U.S. Tax Court for purposes of 26 U.S.C. 7476. The issue thus presented is whether Respondent, having failed to properly pursue her remedies under 26 U.S.C. 7476, is entitled to pursue remedies in the U.S. District Court; or to frame it another way, is Respondent required under ERISA to exhaust her administrative remedies before she may pursue any judical relief?

The Courts have long held that a person must first exhaust administrative rights and such holding does not result in deprivation of otherwise applicable judicial rights. This doctrine has been supported on a number of bases:

1. Efficient management and orderly procedure.
2. Use of an agency specialized understanding.
3. Adequacy of legal remedies.
4. Exclusive jurisdiction.
5. Statutory reformate of a final order.

Petitioner believes that the second and fourth bases set forth above apply in the instant case. Clearly provisions of the IRS code are of a specialized nature, as IRS works with income tax

law on an on-going basis, and likewise, the Department of labor deals with fair labor provisions. These agencies must be presumed to have the specialized understanding to deal with intricate problems in this area. This Court has held in order of the case of *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 567; 66 S. Ct. 322, 325; 90 L. Ed. 318 (1946):

> "* * *. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress."

Moreover, it is clear from the provisions of 26 U.S.C. 7476, that Congress intended that any question with respect to the propriety under the law of provisions of retirement plans be submitted to the DDIR, and only then to the Tax Court. The requirement that the intent of Congress be supported is dealt with in *Aircraft and Diesel Equipment* v. *Hirsch*, 331 U.S. 752, 773-774; 67 S. Ct. 1493, 1504; 91 L. Ed. 1796 (1947), where this Court said:

> "* * *. Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action *or in advance of it* a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit shortcircuiting the administrative process. Congress commands for judicial restraint in this respect are not lightly to be disregarded." (underscoring supplied)

Petitioner is unaware of any case to date of the qualification of a plan before the IRS wherein the Courts have considered the questions of whether provisions of 26 U.S.C. 7476 are exclusive, and/or whether failure to exhaust administrative determinations and seek relief in the U.S. Tax Court is fatal to a claim. There have been a number of cases on the question of whether the exhaustion of administrative remedies is a prerequisite to a suit under ERISA (29 U.S.C., sections 1001 et. seq.), in matters related to the payments of benefits under a plan, however, and there has been a split of authority in the

circuits as to whether exhaustion of administrative remedies is required.

In one of the more recent cases, *Amato* v. *Bernard*, (1980, CA9), 618 F. 2d 559, the court upheld the District Court decision which required the petitioner to exhaust his administrative remedies as a prerequisite to suit under ERISA. In so holding the 9th Circuit Court of Appeals said, in pertinent part:

> "* * *. ERISA itself requires covered benefit plans to provide administrative remedies for persons whose claims for benefits have been denied * * * It also permits the Secretary of Labor to prescribe regulations governing such administrative remedies, * * * and the Secretary has done so, 29 C.F.R. * * * the institution of such administrative claim-resolution procedures was apparently intended by Congress to help reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of claims settlement; and to minimize the costs of claims settlement for all concerned. It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used. * * *
>
> "* * *. The text of ERISA and the policies underlying that text, far from suggesting that Congress intended to abrogate the exhaustion requirement in the case of suits under ERISA or that sound policy would counsel its abrogation by the courts, suggest that the opposite".
>
> "* * *. In sum, we conclude that the federal courts have the authority to enforce the exhaustion requirement in suits under ERISA, and that as a matter of sound policy they should usually do so. Amato has made no cogent argument to the contrary."

The holding of *Amato, supra*, that exhaustion of administrative remedies is required has been adopted in:

the The Second Circuit [*Fox* v. *Merrill Lynch & Co. (1978, SD NY 435 F Supp* 561].

the Third Circuit [*Murphy* v. *Heppenstall Co.* (1979, WD Pa) 473 F Supp 783; *Lucas* v. *Warner & Swasey Co.* (1979, ED Pa) 475 F. Supp 1071, 87 CCH LC 11796; *Scheider* v. *United States Steel Corp.* (1980, WD Pa) 486 F. Supp 211];

the Fourth Circuit [*Taylor* v. *Bakery & Confectionary Union & Industry International Welfare Fund* (1978, ED NC) 455 F. Supp 816];

the Eighth Circuit [*Sample* v. *Monsanto Co.* (1980, ED Mo) 485 F. Supp 1018]; and,

Dist. Col Circuit [*Air Line Pilots Asso., International* v. *Northwest Airlines, Inc.* (1978, DC Dist Col) 444 F. Supp 1138, 103 BNA LRRM 2649, 83 CCH LC par. 10514, affd in part and revd in part on other grounds 200 App DC 219, 627 F.2d 272, 103 BNA LRRM 2652, 88 CCH LC par. 1184!].

The holding of *Amato, supra,* that exhaustion of administrative remedies is required has been disregarded in the following cases, however:

Lewis v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977, ED Pa) 431 F.Supp. 783; and *Morgan* v. *Laborers Pension Trust Fund* (1977, ND Cal) 433 F.Supp. 518.

Petitioner urges the grant of certiorari in the instant case in order that the split between the circuits and within the circuits as to the application of the doctrine of exhausting administrative remedies on the *Amato, supra,* situation be resolved and, moreover, so that a clear determination can be made as to the applicability of the doctrine of exhausting administrative remedies in matters such as the instant case. It is Petitioner's position that the provisions of 26 U.S.C. 7476 represent a clear direction by the U.S. Congress that matters of dispute relating to qualification provisions of a pension plan are subject to and

intended to be submitted to administrative review by the IRS and Department of Labor and, if any "interested party" is aggrieved after such administrative review, such party's initial recourse can only be to the U.S. Tax Court, if such person has exhausted his or her administrative remedies. Petitioner argued such position to the courts below in this case to no avail. Such position was an integral part of Petitioner's presentation to the Trial Court and the Fourth Circuit Court of Appeals, neither of whom even addressed the issue. This Court has not previously considered this argument.

Respondent's action in the U.S. District Court for the District of Maryland was brought under 29 U.S.C. Section 1132, which provides for relief in the event an administrator fails to comply with a request for information and recovery of benefits due under a plan or enforcement of rights under a plan or clarification of rights under a plan. Section 1132 of 29 U.S.C. makes no provision for a determination with respect to the qualification of a plan.

It may be argued that the trial court made no determination with respect to the qualification of the plan, but merely found that Respondent was an employee of Deer Park on July 31, 1978, and therefore, was entitled to contribution and vesting for the Plan year. Petitioner believes, however, that when the evidence contained in contemporaneous documents is considered, it is clear that the Trial Court was motivated to disregard the documentary evidence and enter a judgment based solely on the testimony of Respondent because the Trial Court was offended by the provision in Petitioner's plan that required Respondent to be an employee of Deer Park on July 31, 1978, in order to receive contribution and vesting for the Plan year. Petitioner's belief is based, in part, on the statements of the Trial Court (Appendix C) that: The Court questions seriously whether the "as of anniversary date" requirement is lawful under ERISA; and that "* * * the Plaintiff did not physically

appear for work from July 14 until July 31 of that year, 1978." Petitioner's belief is also based on the fact that the Trial Court ignored the impact of the documentary evidence noted below and the provisions of 29 C.F.R. Section 2530.200b-1(b) (see Appendix A).

The Trial Court relied upon (and the Fourth Circuit Court of Appeals affirmed) Respondent's testimony that she was told by Dr. Hooper that if she did not come in to work for the month of July, 1978, she would be paid for the whole month of July 1978. There nevertheless were the following material contemporaneous documents in evidence before the trial court and the Fourth Circuit Court of Appeals which contradict such testimony:

1. Respondent's pay record, which showed her to have received pay only through July 26, 1978.

2. The employment contract dated January 31, 1975 between Respondent and the predecessor to Deer Park, containing the following provisions:

a. paragraph 16, (the agreement "may only be changed by a signed writing executed by the parties");

b. paragraph 1, ("Respondent shall devote her best efforts and full business time to" her services to Deer Park);

c. paragraph 2, (requires the ninety (90) days written notice prior to July 31 for termination of the agreement);

d. paragraph 10, (Respondent had no authority to contract for or obligate Deer Park without authority [which was contained in all agreements executed by Deer Park with its employees, including Dr. Hooper]); and,

e. paragraph 14, (written notice to be sent by registered mail).

3. The minutes of the meetings of May 5, 1978 and June 20, 1978 in which Respondent acknowledged the requirement for ninety (90) days written notice prior to July 31, 1978.

4. The appointment calendar kept by Deer Park which showed that Respondent worked during the period prior to July 14, 1978.

The finding of the Trial Court that Respondent was an employee of Deer Park on July 31, 1978 is thus in conflict with contemporaneous documents admitted into in evidence. Such documentary evidence shows that Respondent worked during the month of July 1978 in contradiction to her testimony that she was not to have worked during the month of July 1978; that she was not paid for the entire month of July 1978 in contradiction to her testimony that she would be paid for the full month of July 1978; and that Respondent failed to give written notice as required in her agreement. Further, the documents show that there was no authority on the part of Dr. Hooper to excuse Respondent from her employment contract, in contradiction to Respondent's testimony. The documents further show that Respondent was obligated to perform full service in contradiction to her testimony that she was not required to be present on Wednesday July 5, 1978 in the evening hours; on July 29-30, 1978 for her regular turn of weekend duty; during the evening hours of July 24-31 1978; and report to duty on the day when she was excused from jury duty.

The requirements under ERISA for administrative review of pension plan qualification determination provides an opportunity to Respondent to exercise her rights to be heard during the administrative review. The effect of the failure of Respondent to so exercise her rights was obviated, however by the finding of the Trial Court that Respondent was an employee of Deer Park on July 31, 1978, notwithstanding the Trial Court's finding that Respondent did not physically appear for work from July 24-31, 1978 and the documentary evidence which show

that she was not employed on July 31, 1978. It can thus only be concluded by Petitioner that the finding of the Trial Court was its attempt to substitute its judgment as to the qualification of the plan for the procedures set forth by the U.S. Congress for such determination.

The case of *U.S.* v. *United States Gypsum Co., supra,* requires consideration of contemporaneous documents in evidence in reaching a finding of fact. In that case, this Court held:

> "* * *. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite confirmed conviction that a mistake has been committed."
>
> The Court further held at page 396:
>
> "* * *. Where such testimony is in conflict with contemporaneous documents we can give it little weight particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the Trial Court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than, that Finding 118 is clearly erroneous."

Notwithstanding the holding of this Court in *U.S.* v. *United States Gypsum Co.*, supra, the Trial Court and the Appellate Court made a finding based on the testimony of Respondent standing alone. In so doing, the Trial Court and the Fourth Circuit Court of Appeals appear to have departed from the accepted and usual course of judicial proceedings which require that the holdings of this Court be followed. In fact, both courts appear to have reached a determination that the holding of this Court in *U.S.* v. *United States Gypsum Co., supra,* is no longer valid. It is thus necessary that the Court determine the validity and application to this case of its holding in *U.S.* v. *United States Gypsum Co.*, supra.

Assuming this Court reaffirms its holdings of law set forth in *U.S.* v. *United States Gypsum Co., supra,* that contemporane-

ous documents in evidence in this case require a determination that Respondent was not an employee of Deer Park on July 31, 1978 and that the provisions of the Plan which provide no vesting or contributions for the Plan year ended July 31, 1978 are applicable. It would further appear that under the circumstances where there has been a failure by Respondent to exhaust her administrative remedies, and that a challenge to the provisions of the Plan therefore are not within the jurisdiction of the Trial Court.

CONCLUSION

The Petitioner believes that this Court should grant the petition for writ of certiorari as it involves the question of whether the doctrine of exhaustion of administrative remedies applies to determinations under the provisions of ERISA and as there are apparent splits of holding of the Circuits on such question. Further, in light of the determination reached by the Trial Court and Fourth Circuit Court of Appeals, it is believed that this Court should grant the petition for writ of certiorari in order to insure that this Court's decision is *U.S.* v. *United States Gypsum Co., supra,* is recognized and applied in all appropriate cases.

Respectfully submitted,

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APPENDIX

APPENDIX A

Applicable Provisions Of 29 USC 1132

§ 1132. Civil enforcement

(a) A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 [26 USCS §§ 401(a), 403(a), or 405(a)] (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [part 2 — 29 USCS §§ 1051-1061; part 3 — 29 USCS

§§ 1081-1086] (relating to participation, vesting, and funding), only if —

(1) requested by the Secretary of the Treasury, or

(2) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USCS §§ 1101-1114]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

Applicable Provisions Of 26 USC 7476

Sec. 7476 [1954 Code]. (a) CREATION OF REMEDY. — In a case of actual controversy involving —

(1) a determination by the Secretary with respect to the initial qualification or continuing qualification of a retirement plan under subchapter D of chapter 1, or

(2) a failure by the Secretary to make a determination with respect to

(A) such initial qualification, or

(B) such continuing qualification if the controversy arises from a plan amendment or plan termination,

upon the filing of an appropriate pleading, the Tax Court may make a declaration with respect of such intial qualification or continuing qualification. Any such declaration shall have the force and effect of a decision of the Tax Court and shall be reviewable as such. For purposes of this section, a determination with respect to a continuing qualification includes any revocation of or other change in a qualification.

(b) LIMITATIONS. —

(1) PETITIONER. — A pleading may be filed under this section only by a petitioner who is the employer, the plan administrator, an employee who has qualified under regulations prescribed by the Secretary as an interested party for purposes of pursuing administrative remedies within the Internal Revenue Service, or the Pension Benefit Guaranty Corporation.

(2) NOTICE. — For purposes of this section, the filing of a pleading by any petitioner may be held by the Tax Court to be premature, unless the petitioner establishes to the satisfaction of the court that he has complied with the requirements prescribed by regulations of the Secretary with respect to notice to other interested parties of the filing of the request for a determination referred to in subsection (a).

(3) EXHAUSTION OF ADMINISTRATIVE REMEDIES. — The Tax Court shall not issue a declaratory judgment or decree under this section in any proceeding unless it determines that the petitioner has exhausted administrative remedies available to him within the Internal Revenue Service. A petitioner shall not be deemed to have exhausted his administrative remedies with respect to a failure by the Secretary to make a determination with respect to initial qualification or continuing qualification of a retirement plan before the expiration of 270 days after the request for such determination was made.

Applicable Provisions of 26 CFR 7476 - 1 and 26 CFR 7476 - 2

[¶ 5819M] § 1.7476-1 Interested parties. — (a) *In general* — (1) *Notice requirement.* Before the Internal Revenue Service can issue an advance determination as to the qualified status of certain retirement plans, the applicant must provide the Internal Revenue Service with satisfactory evidence that such applicant has notified the persons who qualify as interested parties, under regulations prescribed under section 7476(b)(1) of the Code, of the application for such determination. See section 3001(a) of the Employee Retirement Income Security Act of 1974 (88 Stat. 995). For the rules for giving notice to interested parties, see § 1.7476-2 and paragraph (o) of § 601.201 of this chapter (Statement of Procedural Rules).

(2) *Declaratory judgments.* Section 7476 provides a procedure for obtaining a declaratory judgment by the Tax Court with respect to the initial or continuing qualification under subchapter D of chapter 1 of the Code of a retirement plan defined in section 7476(d), in the case of an actual controversy involving:

(i) A determination by the Internal Revenue Service with respect to the initial qualification or continuing qualification under such subchapter of such a plan, or

(ii) A failure by the Internal Revenue Service to make a determination with respect to —

(A) Such initial qualification of such a plan, or

(B) Such continuing qualification of such a plan, if the controversy arises from a plan amendment or plan termination.

Under section 7476(d) the term "retirement plan" means a pension, profit-sharing, or stock bonus plan described in section 401(a), or a trust which is part of such a plan, an annuity plan described in section 403(a), or a bond purchase plan described in section 405(a). This procedure is available only to the employer, the plan administrator as defined in section 414(g), an employee who qualifies as an interested party as defined in this section, or the Pension Benefit Guaranty Corporation, where such person has an actual controversy involving a determination described in paragraph (a)(2)(i) of this section, or

failure to make a determination described in paragraph (a)(2)(ii) of this section. In the case of an application for such a determination, this procedure is available only if such determination or failure to make such determination is with respect to an application described in paragraph (b)(7) of this section. In addition, in the case of such an application, if a petitioner was the applicant for the determination, the Tax Court may hold, under section 7476(b)(2), the filing of a pleading for a declaratory judgment to be premature unless the petitioner establishes to the satisfaction of the Tax Court that such petitioner has caused the interested parties to be notified in accordance with this section and § 1.7476-2.

(b) *Interested parties* — (1) *In general*. If paragraphs (b)(2), (3), (4) and (5) of this section do not apply, then, except as otherwise provided in paragraphs (b)(6)(i), (ii), and (iii) of this section, the following persons shall be interested parties with respect to an application for an advance determination as the the qualified status of a retirement plan:

(i) All present employees of the employer who are eligible to participate in the plan (as defined in paragraph (d)(2) of this section), and

(ii) All other present employees of the employer whose principal place of employment (as defined in paragraph (d)(3) of this section) is the same as the principal place of employment of any employee described in paragraph (b)(1)(i) of this section.

(2) *Certain plans covering a principal owner*. Notwithstanding paragraph (b)(1) of this section, where —

(i)A principal owner (within the meaning of paragraph (d)(2) of § 11.414(c)-3 of this chapter (Temporary Income Tax Regulations under the Employee Retirement Income Security Act of 1974) of the employer or of a common parent of the employer (where the employer is a member of a parent-subsidiary group of trades or businesses under common control under section 414(b) or (c)) is eligible to participate in the plan, and

(ii) the number of employees employed by such employer (including all employees who by reason of section 414(b) or (c) are treated as employees of such employer) is 100 or less,

then except as otherwise provided in paragraphs (b)(6) (i), (ii), and (iv) of this section, all present employees of the employer shall be interested parties with respect to an application for an advance determination as to the qualified status of the retirement plan.

(3) *Certain Plan amendments*. In the case of an application for an advance determination as to whether a plan amendment affects the continuing qualification of a plan, if —

(i) there is outstanding a favorable determination letter for a plan year to which section 410 applies, and

(ii) the amendment does not alter the participation provisions of the plan,

then paragraphs (b)(1) and (2) of this section shall not apply, and all present employees of the employer who are eligible to participate in the plan (as defined in paragraph (d)(2) of this section), shall be interested parties. For the purpose of this paragraph (b)(3), if qualification of the plan is dependent upon benefits under the plan integrating with those benefits provided under the Social Security Act or a similar program, and if such integration results in excluding any employee or could possibly result in any participant's benefit being reduced to zero and the amendment alters contributions to or the amount of benefits payable under the plan, then the amendment shall be considered to alter the participation provisions of the plan.

(4) *Collectively bargained plans*. In the case of an application with respect to a plan described in section 413(a) (relating to collectively bargained plans), paragraphs (b)(1), (2) and (3) of this section shall not apply and all present employees covered by a collective-bargaining agreement pursuant to which the plan is maintained shall be interested parties.

(5) *Plan Terminations*. In the case of an application for an advance determination with respect to whether a plan termination affects the continuing qualification of a retirement plan, paragraphs (b)(1), (2), (3) and (4) of this section shall not apply, and all present employees with accrued benefits under the plan, all former employees with vested benefits under the plan, and all beneficiaries of deceased former employees currently receiving benefits under the plan, shall be interested parties.

(6) *Exceptions*. (i) In the case of an application to which paragraph (b)(1) or (2) of this section applies, an employee who is not eligible to participate in the plan shall not be an interested party if such employee is excluded from consideration for purposes of section 410(b)(1) by reason of section 410(b)(2)(B) or (C).

(ii) In the case of an application to which paragraph (b)(1) or (2) of this section applies, an employee who is not eligible to participate in the plan shall not be an interested party if such plan meets the eligibility standards of section 410(b)(1)(A).

(iii) In the case of an application to which paragraph (b)(1) of this section applies, an employee who is not eligible to participate in the plan shall not be an interested party with respect to such plan if such employee is eligible to participate in any other plan of the employer with respect to which a favorable determination letter is outstanding (whether or not issued pursuant to an application to which this section applies), or in such a plan of another employer whose employees, by reason of section 414(b) or (c), are treated as employees of the employer making the application.

(iv) In the case of an application to which paragraph (b)(2) of this section applies, an employee who is not eligible to participate in the plan shall not be an interested party with respect to such plan if such employee is eligible to participate in a plan described in section 413(a) (relating to collectively bargained plans) maintained by the employer with respect to which a favorable determination letter is outstanding (whether or not issued pursuant to an application to which this section applies), or in such a plan of another employer whose employees, by reason of section 414(b) or (c), are treated as employees of the employer making the application.

(7) *Applicability*. Paragraph (b) of this section shall only apply in the case of an application made to the Internal Revenue Service requesting an advance determination that a retirement plan as defined in section 7476(d) and paragraph (a) of this section meets the requirements for qualification for a plan year or years to which section 410 applies to such plan. See paragraph (c)(4) and (5) of this section for special rules in respect of years to which section 410 applies.

(c) *Special rules*. For purposes of paragraph (b) of this section and § 1.7467-2 —

(1) *Time of determination*. The status of an individual as an interested party and as a present employee or former employee shall be determined as of a date determined by the applicant, which date shall not be earlier than five business days before the first date on which the notice of the application is given to interested parties pursuant to § 1.7476-2 nor later than the date on which such notice is given.

(2) *Controlled groups, etc.* An individual shall be considered to be an employee of an employer if such employee is treated as that employer's employee under section 414(b) or (c).

(3) *Self-employed individuals*. A self-employed individual shall be considered an employee.

(4) *Years to which section 410 relates*. For purposes of paragraph (b)(7) of this section, section 410 shall be considered to apply to a plan year if an election has been made under section 1017(d) of the Employee Retirement Income Security Act of 1974 to have section 410 apply to such plan year, whether or not the election is conditioned upon the issuance by the Commissioner of a favorable determination letter.

(5) *Government, church plans, etc.* In the case of an organization described in section 410(c)(1), section 410 will be considered to apply to a plan year of such organization for any plan year to which section 410(c)(2) applies to such plan.

(d) *Definitions*. For the purposes of paragraph (b) of this section and § 1.7476-2 —

(1) *Employer*. The term "employer" includes all employers who maintain the plan with respect to which an advance determination applies. A sole proprietor shall be considered such person's own employer and a partnership is considered to be the employer of each of the partners.

(2) *Eligible to participate*. For purposes of this section, an employee is eligible to participate in a plan if such employee —

(i) is a participant in the plan,

(ii) would be a participant in the plan if such employee met the minimum age and service requirements of the plan or

(iii) would be a participant in the plan upon making mandatory employee contributions.

In applying this paragraph (d)(2), plan provisions (with respect to which the determination regarding qualification is to be based) not in effect on the first date on which notice is given to interested parties shall be treated as though they were in effect on such date.

(3) *Place of employment.* A place of employment includes all worksites within a plant, installation, store, office, or similar facility. Any employee who has no principal place of employment shall be treated as though such employee's principal place of employment is that place to which such employee regularly reports to the employer. [Reg. § 1.7476-1.]

.01 Historical Comment: Proposed 6/4/75. Adopted 5/20/76 by T.D. 7241. The Preamble to T.D. 7241 is at 769 CCH ¶ 6658.

Regulations

[¶ 5819N] § 1.7476-2. Notice to interested parties. — (a) *In general.* Any person applying to a district director for a determination described in paragraph (b)(7) of § 1.7476-1 shall cause notice of the application to be given to persons who qualify as interested parties under § 1.7476.-1 with respect to the application, whether or not such application is received by the Internal Revenue Service before the date on which section 410 applies to the plan.

(b) *Nature of notice.* The notice required by this sectio shall be given in writing, shall contain the information and be given within the time prescribed in paragraph (o)(3) of § 601.201 of this chapter (Statement of Procedureal Rules), and shall be given in the manner prescribed in paragraph (c) of this section.

(c) *Method of giving notice* — (1) *Present employee.* In the case of a present employee who is an interested party, notice shall be given in person, by mailing, by posting, or by printing it in a publication of the employer or an employee organization which is distributed in such a manner so as to be reasonably available to such employee. Notice

given by posting shall be made by posting such notice (i) at those locations within the principal places of employement of the interested parties which are customarily used for employer notices to employees with regard to labor-management relations matters, or (ii) if the plan is maintained pursuant to one or more collective-bargaining agreements, at those locations described in (i) or at those locations customarily used by the employee representatives for posting notices with regard to labor-management relations matters (such as local union meeting places) in the geographical area or areas within which the interested parties are employed. Regardless of which method is used to notify an employee, if an interested party who is a present employee is in a unit of employees covered by a collective-bargaining agreement between employee representatives and one or more employers, notice shall be given in person or by mail to the collective-bargaining representative of such interested party.

(2) *Former employee or beneficiary.* (i) Except as otherwise provided in paragraph (c)(2)(ii) of this section, in the case of a former employee or beneficiary who is an interested party, notice shall be given in person or by mail to the last known address of such former employee or beneficiary.

(ii) In cases in which compliance with the methods for notification prescribed in paragraph (c)(2)(i) of this section will present unusual financial or administrative burdens or, by reason of the peculiar circumstances of the case, cannot reasonably be expected to result in adequate and timely notice, applicants for advance determination letters may cause notice to be given to former employees or beneficiaries by methods other than those described in such paragraph (c)(2)(i) provided such methods are reasonably calculated to provide timely notice to such employees or beneficiaries who are interested parties, or to established representatives of such interested parties who may be reasonably expected to act in their interest and on their behalf. In such a case, the application for determination shall be accompanied by a full description of the method of notification used, as well as the particular financial or administrative burdens that would have occurred if notice had been given pursuant to the methods prescribed in paragraph (c)(2)(i) of this section, or the reasons why such prescribed methods would not have resulted in adequate or timely notice.

(d) *Effective date.* (1) The provisions of § 1.7476-1 and this section shall apply to applications referred to in paragraph (b) of § 1.7476-1 made on or after June 21, 1976. Sections 11.7476-1, and 11.7476-2 of this chapter (Temproary Income Tax Regulations under the Employee Retirement Income Security Act of 1974) as promulgated by Treasury Decision 7358 (May 30, 1975) shall apply to applications made before such date. However, an applicant may elect to have the provisions of § 1.7476-1 and this section apply with respect to an application made after May 20, 1976 and before June 21, 1976. Such election may be made by attaching to the application as originally submitted, a statement that the applicant has elected to have the provisions of § 1.7476-1 and this section apply.

(2) Notwithstanding paragraph (d)(1) of this section, if —

(i) the plan or plan amendment which is the subject of application for advance determination, is adopted on or before May 30, 1976 and,

(ii) such application for advance determination is made before September 2, 1976, the applicant may elect to have the provisions of §§ 11.7476-1 and 11.7476-2 of this chapter (Temproary Income Tax Regulations under the Employee Retirement Income Security Act of 1974) apply with respect to such application made on or after June 21, 1976 and before September 2, 1976. Such an election may be made by attaching to the application as originally submitted, a statement that the applicant has elected to have the provisions of §§ 11.7476-1 and 11.7476-2 of this chapter (Temporary Income Tax Regulations under the Employee Retirement Income Security Act of 1974) apply [Reg. § 1.7476-2.]

Applicable Provisions Of 26 CFR 602.201

26 CFR 602.201(o)(3):

(f) whether or not the Service has issued a previous determination as to the qualified status of the plan;

(g) a statement that any person to whom the notice is addressed is entitled to submit, or request the Department of Labor to submit, to the district director described in paragraph (o)(3)(xvi)(*d*) of this section, a comment on the question of whether the plan meets the requirements for qualification under part I of Subchapter D of Chapter 1 of the Internal Revenue Code of 1954; that two or more such persons may join in a single comment or request; and that if such a person or persons request the Department of Labor to submit a comment and that department declines to do so in respect of one or more matters raised in the request, the person or persons so requesting may submit a comment to the district director in respect of the matters on which the Department of Labor declines to comment;

(h) that a comment to the district director or a request of the Department of Labor must be made according to the following procedures:

(1) a comment to the district director must be received on or before the 45th day (specified by date) after the day on which the application for determination is received by the district director;

(2) or if the comment is being submitted on a matter on which the Department of Labor was first requested but declined to comment, on or before the later of such 45th day or the 15th day after the day on which the Department of Labor notifies such person or persons that it declines to comment, but in no event later than the 60th day (specified by date) after the day the application is received by the district director; and

(3) a request of the Department of Labor to submit such a comment must be received by such department on or before the 25th day (specified by date) (or if the person or person requesting the Department of Labor to submit such a comment wish to preserve their right to submit a comment to the district director in the event the Department of Labor declines to comment, on or before the 15th day

(specified by date)) after the day the application is received by the district director;

(i) except to the extent there is included in the notice the additional informational materials which paragraphs (o)(3)(xviii), (xix), and (xx) of this section require be made available to interested parties, a description of a reasonable procedure whereby such additional informational material will be made available to them (see paragraph (o)(3)(xvii) of this section).

(xiv) In the case of an application for a determination for plan years to which section 410 applies (see paragraph (o)(5)(vi) of this section), notice that an application for an advance determination regarding the qualification of plans described in section 401(a), 403(a), or 405(a) is to be made must be given to all interested parties in the manner set forth in the regulations under section 7476 of the Code.

(xv) When the notice referred to in paragraph (o)(3)(xiv) of this section is given by posting or in person, such notice must be given not less than 7 days nor more than 21 days prior to the date that application for a determination is made. When the notice is given by mailing, it should be given not less than 10 days nor more than 24 days prior to the date the application for a determination is made. See paragraph (o)(3)(xxi) of this section for determining when an application is made. If, however, an application is returned to the applicant for failure to adequately satisfy the notification requriement with respect to a particular group or class of interested parties, the applicant need not cause notice to be given to those groups or classes of interested parties with respect to which the notice requirement was already satisfied merely because, as a result of the resubmission of the application, the time limitations of this paragraph (o)(3)(xv) would not be met.

(xvi) The notice referred to in paragraph (o)(3)(xiv) of this section shall be in writing and shall contain the following information:

(a) a brief description identifying the class or classes of interested parties to whom the notice is addressed (*e.g.*, all present employees of the employer, all present employees eligible to participate);

(b) the name of the plan, the plan identification number, and the name of the plan administrator;

(c) the name and taxpayer identification number of the applicant;

(d) that an application for a determination as to the qualified status of the plan is to be made to the Internal Revenue Service, stating whether the application relates to an initial qualification, a plan amendment or a plan termination, and the address of the district director to whom the application will be submitted;

(e) a description of the class of employees elibile to participate under the plan;

Applicable Provisions of 29 CFR 2530.200 b-1(b)

"* * * It should be noted, however, that in certain circumstances, a plan may provide that certain consequences follow from an employee's failure to be employed on a particular date. For example, under section 202(a)(4) of the Act and section 410(a)(4) of the Code, a plan may provide that an individual otherwise entitled to commence participation in the plan on a specified date does not commence participation on that date if he or she was separated from the service before that date. Similarly, under section 204(b)(1) of the Act and section 411(b)(1) of the Code, a plan which is not a defined benefit plan is not subject to section 204(b)(1) and (b)(3) of the Act and section 411 (b)(1) and (b)(3) of the Code. Such a plan, therefore, may provide that an individual who has been a participant in the plan, but who has separated from service before the date on which the employer's contributions to the plan or forfeitures are allocated among participant's accounts or before the last day of the vesting computation period does not share in the allocation of such contributions or forfeitures even though the individual is credited with 1000 or more hours of service for the applicable vesting computation period. Under certain circumstances, however, such a plan provision may result in discrimination prohibited under section 401(a)(4) of the Code. See Revenue Ruling 76-250, I.R.B. 1976-27

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 80-1803

CHERYL WINCHELL, M.D.

Appellee,

v.

DEER PARK MEDICAL GROUP, P.A.,
MONEY PURCHASE PENSION PLAN

Appellants.

Appeal From The United States District Court
For The District Of Maryland, At Baltimore.
Joseph H. Young, District Judge.

Argued June 4, 1981 Decided August 17, 1981

Before WIDENER and MURNAGHAN, Circuit Judges, BRITT, District Judge*

SYLMAN I. EUZENT, ROGER K. ZUKER, for Appellants; D. LEAH MELTZER (GARY HOWARD SIMPSON, JOHN S. STOPPELMAN, STOPPELMAN, STOPPELMAN & ROSEN, on brief) for Appellee.

PER CURIAM:

This is an appeal from a judgment of the district court awarding Dr. Cheryl Winchell certain vested benefits in the pension fund of Deer Park Medical Group, etc.

The principal issue in the case is whether or not Dr. Winchell was an employee up to and including July 31, 1978. The district court

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* United States District Court for the Eastern District of North Carolina, at Fayetteville, sitting by designation.

found that she was, and we think its finding is not clearly erroneous and is supported by the record. FRCP 52(a).

We are of opinion the defendants' other contentions are without merit and that plaintiff was entitled to an attorney's fee as awarded by the district court.

Accordingly, we affirm the district court on its oral opinion.

AFFIRMED.

APPENDIX C

Oral Opinion Of U.S. District Court For District Of Maryland

ORAL OPINION OF THE COURT

THE COURT: Gentlemen and parties, I have reviewed the evidence that has been introduced in this case, as well as the memoranda that have been filed; not only the pretrial memoranda, but the Motions for Summary Judgment and the memoranda attached to those.

So that the record is clear, Mr.McElhone, Defendant's Deer Park Medical Group, P.A. Money Purchase Pension Plan, and James L. Hooper's motion for summary judgment, which was filed, I believe, September 30, the motion is denied.

THE CLERK: Yes, sir.

There is also a separate motion of the Defendant James L. Hooper, that was filed October 2.

THE COURT: That is also denied.

Let me first say that the comments that I make, the findings of fact and conclusions of law, in connection with the oral opinion which I am giving at this time, are made in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure, whether or not so specifically indicated.

The case involves the attempts of the Plaintiff, Dr. Cheryl Winchell, to recover her allegedly vested portions of certain pension benefits from the Deer Park Medical Group Money Purchase Pension Plan, as well as her attempts to remove Dr. James Hooper from his current position as the Plan Administrator of the plan.

There are a number of legal issues presented by counsel for consideration; some of which are either patently frivilous, or plainly obstructionary; the remainder involve the proper interpretation of certain plan provisions and relevant sections of ERISA, 29 U.S. Code, Section 1001 and following. The Court finds there are eight issues worthy of careful consideration, and, for the following reasons, Plaintiff's requested relief is granted in part and denied in part.

Careful consideration by the Court results in the following comments:

On issue one, did Plaintiff's right to pension benefits vest for the period of fiscal 1978, the factual background of this issue, which is undeniably the central issue presented in this action, can be stated very simply.

Plaintiff began work with Hooper and Kordon, P.A., the predecessors of the Deer Park Medical Group, in January of 1973. On June 29, 1978, Plaintiff submitted her resignation to Dr. Hooper, to be effective July 31, 1978, the end of Deer Park's fiscal year. The Plaintiff did not physically appear for work from July 14 until July 31 of that year, 1978. As a result of this failure to appear for work, the Defendants claim that Plaintiff is not entitled to a vesting of her pension benefits for the 1978 fiscal year. Plaintiff, on the other hand, submits that since she was an employee of the Deer Park Medical Group during fiscal 1978, for a time far in excess of 1000 hours — actually, it was 1600 hours, she is entitled to vesting under the plain language of ERISA, Section 1053(b)(2)(A).

First, counsel dispute the threshold issue of which pension plan is relevant in this case. Plaintiff contends that the 1976 pension plan is relevant to the issue of vesting; Defendants contend that the 1979 amendments to that plan, which are alleged to be retroactive to 1977, are controlling.

It is not necessary to decide this issue, because even if the 1979 plan is controlling, the evidence in the case makes clear that Plaintiff was an employee of the Deer Park Medical Group up to and including July 31, 1978, and is entitled to vesting. Paragraph 1.42 of the 1979 plan ostensibly sets forth the requirements which an employee must meet to be eligible for vesting, and they are as follows:

Eligible participant shall mean an employee whose employment is for more than 1000 hours per 12 month period; who is employed as of the anniversary date, and who shall have completed three months of service as of the anniversary date.

The Court questions seriously whether the "as of the anniversary date" requirement is lawful under ERISA. However, since the Plain-

tiff was in fact an employee of the Deer Park Medical Group as of July 31, 1978, even under this restrictive language, it would be improper to consider the issue of Paragraph 1.42 as to legality at this time.

As mentioned previously, Plaintiff did submit a resignation to Dr. Hooper effective July 31, 1978. In fact, the Plaintiff failed to appear for work at Deer Park after July 14, 1978. From the evidence presented, and the credibility of certain witnesses generally, the following findings of fact are made:

First, that the Defendant Hooper excused the Plaintiff from appearing at work after July 14. It is improper for this Defendant to now contend that her effective date of resignation was other than that stated in her resignation.

Secondly, from July 14 until July 24, Plaintiff was excused from work by reason of accrued vacation time.

Third, from July 24th up to and including July 31st, Plaintiff was properly serving on jury duty. This jury duty service is certainly a legitimate excuse for Plaintiff's failure to appear at work under the plain dictates of 29 C.F.R. Section 2530.200b-2(a)(2). Furthermore, Paragraph 1.42 of the plan does not say, if indeed it legally could say, that jury duty is not such a legitimate excuse. The cases cited by the Defendants are, thus, totally inapposite; for example, Barcelona v. Fox Grocery Co. Employee Pension Plan, 483 F. Supp. 1128, decided by the Western District of Pennsylvania in 1980, and Vimco Concrete Accessories, Inc. v. Maggitti, 44 Md. App. 176, 407 A. 2d 1187, decided in 1976.

Fourth, and finally, the Plaintiff was aware that a substitute worker had been obtained to cover for her on July 29 and 30, the weekend shift that she was due to serve at that time.

It is clear, even under the most restrictive sections of Defendant's restrictive plan, the Plaintiff worked a full and consecutive fiscal year under the terms of the language, and the Court's construction of that language, and, thus, is entitled to vesting for the 1978 period.

The second issue, did the Plaintiff's right to pension benefits vest for the period of fiscal 1973, from the evidence presented, and considering that ERISA was not in effect during fiscal 1973, the Plaintiff is not entitiled to vesting for 1973.

The third issue, is Plaintiff entitled to a lump sum payment of her pension benefits for the 1974-1978 fiscal period. This issue arises from the following context:

Normally, ERISA pension proceeds are invested in annuity contracts which provide for periodic payments to the annuitant upon the annuitant's reaching the age of 65, or upon disability or death. This is in keeping with ERISA's purpose of providing retirement benefits. Section 1056(a)(3), however, permits a terminated employee to begin receiving payments within 60 days of the termination date, and the Deer Park pension plan further permits a lump sum payment after a written request made within a reasonable time after the termination becomes effective.

Alternatively, Paragraph 5.06 and Paragraph 12.15 of the plan permit a former employee to request a rollover of all benefits into an Individual Retirement Account (IRA), to be held in the former employee's name.

The issue here presented is whether Plaintiff required either or both of these procedures in a timely and complete manner, and whether Defendants denied those alleged requests in accordance with the provisions of the plan.

The Plaintiff has contended that she did comply with the procedures outlined in the plan Paragraph 6.03, by requesting a lump sum payment in writing, and that the Defendant Hooper frivilously denied that request by tendering a check for an amount far less than Plaintiff's account indicated she was entitled to. Defendant contends that the plaintiff never made a proper claim for a lump sum payment. As for the rollover provisions, Plaintiff has, likewise, contended that she made proper requests for an IRA account, which Defendant Hooper wrongfully denied. The Defendant has counter, correctly, indeed, that Plaintiff did make a proper request for a rollover and that request was never denied. Rather, Defendant has shown that he agreed to place the funds in an IRA account on the condition that the Plaintiff would acknowledge in writing that she would be forfeiting the Federal penalty for early withdrawal to the bank where her money was resting at the time of her request. The Plaintiff has not acknowledged this statement.

The issue, then, should have been worked out by counsel, but not having been resolved, it is the Court's opinion that the Plaintiff did request a lump sum payment, and that the Plaintiff rejected the check for the bona fide reason that she contested the amount. Plaintiff legitimately requested an IRA account; therefore, Plaintiff is entitled to choose either a lump sum or an IRA in an amount equal to her vested interest, an amount which will be determined by statements to be made hereafter.

The fourth issue is did a loan made by the plan to Sylman I. Euzent, in July of 1979, violate the prohibited transactions section of ERISA in Title 29, U.S. Code, Section 1106.

The issues four through six deal with the question of whether Defendant Hooper carried out his fiduciary responsibilities in authorizing certain loans. It is clear that the Plaintiff, as a participant, has standing to assert these claims under Section 1132(a) of ERISA. Secondly, it is also clear that this Court has broad equitable powers to correct breaches of fiduciary duty under ERISA, if such exist. Refer to Eaves v. Perry, 587 F2d 453, decided by the Tenth Circuit in 1978. Third, the Court is not convinced that the Euzent loan violated the prohibited transactions section of ERISA for the simple reason that there has not been sufficient evidence presented to indicate that Mr. Euzent was a party in interest. Section 1106 plainly prohibits loans to parties in interest, and Section 1002(14) of ERISA, just as plainly, includes counsel of an employee benefit plan within its definition of a party in interest. However, there is no evidence here indicating that Mr. Euzent was, at the time of the 1979 loan, or indeed ever, counsel for the plan. The loan, therefore, does not violate ERISA Section 1106.

On the fifth issue, the question is whether or not Dr. Hooper caused payments to the plan to be made in favor of his wife, Martha Hooper, a non-employee of the Deer Park Medical Group.

It has been conceded, at trial that payments to the pension fund were made for the benefit of Martha Hooper. The question, then, is whether or not Martha Hooper was a bona fide employee of the Group. If she was, then no fiduciary violation occurred; if not, Section 1104 of ERISA was violated, since the plan itself requires

contributions to be made soley for the benefit of employees of the Group.

From the testimony and evidence presented at this trial, the Court is satisfied that Martha Hooper was a bona fide employee of the Deer Park Medical Group, and that, hence, the payments were proper.

On the sixth issue, requiring a determination of whether various loans made by the plan and collateralized by Dr. Hooper's vested interest violated the general fiduciary duty provisions of ERISA, Section 1104, that section places a two-fold duty on every fiduciary, and I quote, in part:

". . . to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes of benefitting the participants and beneficiaries of the plan and in accordance with the documents . . . governing the fund."

Referring to the 93rd Congress' Document 93-127, 1st Session, reprinted in 1974 in the U.S. Code Congressional Administrative News, page 4866.

The initial question, therefore, is whether these loans violate the "exclusive purposes" and "prudent man" rules embodied in that Section. The Court is satisfied that this type of loan could, under certain circumstances, violate these dual purposes that underlie Section 1104. A trustee, as stated, is obligated to deal solely for the "exclusive purposes" of the trust, and this motivation could be adversely affected by the fact that the trustee has a personal interest in the trust serving as collateral. Furthermore, it can be argued that Paragraph 8.01 of the plan itself prohibits this type of transaction. Nevertheless, Plaintiff's request that Dr. Hooper be removed as plan administrator is not appropriate in this case, even though such removal can be authorized under Section 1109(a) of ERISA.

However, exercising this Court's broad equitable powers, the administrator should discontinue this practice of collateralizing authorized loans with his personal vested interest in the plan from this date forward.

The seventh issue is whether or not the Defendant should be required to pay $100 a day to the Plaintiff on account of his refusal to provide information in violation of Section 1132(c) of ERISA.

In the exercise of the discretion conferred under Section 1132(c) of ERISA, no fine will be assessed; the Court recognizing, however, that the Defendant was somewhat less than forthright in providing information requested to Plaintiff or her counsel.

The eighth issue is whether or not Plaintiff is entitled to attorney's fees pursuant to ERISA Section 1132(g).

Considering the relevant facts and noting the case law, specifically Fase v. Seafarers Welfare and Pension Plan, 589 F2d 112 at 116, a Second Circuit opinion decided in 1978, and Baeten v. Van Ess, 474 F. Supp. 1324, decided by the Eastern District of Wisconsin in 1979, and Thomas v. Marshall, decided by the Southern District of Alabama in 1979 and reported at 482 F. Supp. 160, 168-70, considering, as I have, these cases, as well as applying the testimony and the exhibits that have been introduced into this case, there are certain examples apparent to this Court of bad faith on the part of the Defendants. A refusal to pay the Plaintiff the 1978 benefits because she may not have worked a few hours on July 31, 1978 is unjustifiable under any standard. Second, the exhibits in the case, as interpreted, based upon the testimony introduced with them, contain many examples of back-dated loan documents intentionally performed by the Defendant. Further, based upon Plaintiff's Exhibit No. 83, and other evidence, Paragraph 1.42 of the 1979 plan was an unsuccessful attempt to deny her legitimately vested rights; secondly, the Defendant's failure to pay the plaintiff the required amounts that were due to her; under the reasoning of the Court in this case, the failure to provide the information directed and the necessity of causing the Plaintiff to file litigation seeking the redress, as she has done in this case, require Plaintiff's counsel to be paid a reasonable attorney's fee in the amount of $3500.

The Court would further determine that the amount of the payment to be made to the Plaintiff, based upon the 50 per cent vesting plan, which is evident from the records that have been submitted in Court, would indicate that those funds — well, I am not sure counsel will be

able to agree upon them; it would be the funds determined to be due as of 1978 — the 1978 figure listed on Defendants' Exhibit 15, which shows the year end balance in the Plaintiff's account to be $25,676.85, less the 1973 amount, which is listed as $1216.32, plus the amount which I think was indicated to be about $7500 for 1978, and that then would be the amount to which the Plaintiff would be entitled.

The figure, it seems, would come to, generally, about $18,000. I may be off somewhat. If counsel cannot agree upon the figure, I will, of course, determine what that is, promptly.

The amount of money paid into the Registry of the Court, $12,000-plus, will, of course, be available for the payment of a portion of this, plus the additional funds which should come from the pension plan.

Now, as I have indicated, these are the conclusions of the Court. As indicated, this will take care of the opinion of the Court; there will be no further written opinion of any kind. If any further proceeding is necessary in connection with these proceedings, the transcript of the evidence will include the oral opinion of the Court as well.

Now, the only thing that, then, is remaining unresolved is the exact amount of the judgment to be entered in favor of the Plaintiff against the Defendants. As I have indicated, that will be determined by taking the figure available for 1978 from Defendants' Exhibit 15, which lists the under-funding portion plus earnings; which it also includes the contribution that would be made for that year, less the 1973 amount of $1216.32 . . . I think it is simply an arithmetic matter for counsel to solve. Not having been able to resolve very much in the past in this case, it may not be possible to resolve that. If so, if you will notify me within 10 days, I will do so, resolve that portion of the judgment.

Pending an agreement of counsel, or disagreement, if this is brought to the Court's attention, the case will stand as indicated. When I receive an acknowledgment from counsel that the amount agreed upon — not that they agree that that is the amount due, but under the calculations I have given here, that is the amount determined by the Court to be due, I will enter judgment accordingly.

If you are unable to agree upon it within 10 days, notify me, and I will act accordingly.

MR. SIMPSON: Your Honor, are costs included in the judgment?

THE COURT: No costs.